No. 93-1804

Supreme Court, U.S.
FILED
MAY 24 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT RACHEL HOLLAND'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review the concurrent findings of fact of the Court of Appeals, the District Court and the California Department of Education that respondent Rachel Holland receives substantial benefit from placement in a regular education class?[1]

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[1] The "Questions Presented" set forth in the Petition are not in fact presented by this case.

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SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION,

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RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND; WILLIAM HONIG, CALIFORNIA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; CALIFORNIA STATE DEPARTMENT OF EDUCATION HEARING OFFICE, McGEORGE SCHOOL OF LAW; and MARY COTE, HEARING OFFICER,

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT RACHEL HOLLAND'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rachel Holland opposes the Petition for Writ of Certiorari. Petitioner has not established any special or important reason for this court to review the decision below. Petitioner's Questions Presented are all predicated on a factual dispute that was resolved by the California Department of Education, U.S. District Court, and the U.S. Court of Appeals for the Ninth Circuit and

there is no conflict among the Circuit Courts raised by this case.

STATEMENT OF THE CASE

Rachel Holland was 7 years old when this litigation commenced in the Fall of 1989. She is "well behaved and popular", "enjoys school and is motivated to learn". Dist. Ct. Pet. App. G., p. 25a.[2] Rachel has moderate developmental disabilities. *Id.* Rachel attended a regular day-care program for non-disabled children in Sacramento, California, until she was three and a half. For the following three and a half years (until age seven), Rachel was placed in special education classes by the petitioner school district. Most of that time she had little or no opportunity to participate in regular education classes with non-disabled children.[3] Pet. App. I, pp. 56a-58a.

While Rachel was in special education classes, her parents repeatedly requested that she have opportunities to participate in regular classes with non-disabled children. After almost three years of requests, pursuant to a mediated agreement, the school district agreed to

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[2] The opinion of the United States Court of Appeals for the Ninth Circuit reported at 14 F.3d 1398 (January 24, 1994) is referred to herein at Ninth Cir. Pet. App. F; opinion of the United States District Court for the Eastern District (Levi, D.J.) is reported at 786 F. Supp 874 (March 2, 1992) is referred to herein at Dist. Ct. Pet. App. G; opinion of the California State Hearing Office is not reported. It is referred to herein at H.O. Pet. App. I.

[3] For a complete account of Rachel's educational history and the course of proceedings below, see California Department of Education Hearing Officer's Order at H.O. Pet. App. I, pp. 56a-61a and federal district court Judge Levi's decision at Dist. Ct. Pet. App G, pp. 25a-30a.

integrate Rachel into a regular kindergarten class for about one hour per day. Dist. Ct. Pet. App. G., pp. 26a. During the few months that this integration occurred, the regular teacher received no consultation from a special education teacher and no training or aide or other support. H.O. Pet. App. I, p. 81a.

Unsatisfied with the district's efforts to mainstream Rachel, in September, 1989 Rachel's parents initiated an administrative hearing to obtain placement in a regular class with supplementary special education services. They also enrolled Rachel in a regular kindergarten class in a private school, Shalom School.[4] The school district maintained that Rachel should remain in a special education class for a majority of the school day with some integration into a regular class. Dist. Ct. Pet. App. G., pp. 26a-27a.

Following an extensive 14-day state administrative hearing, with testimony from 20 witnesses, the California Department of Education hearing officer ruled in favor of the Hollands and ordered that Rachel be placed in a regular first-grade class with supplementary support services (a part-time aide and part-time consultation from a special education teacher) for the following school year. Dist. Ct. Pet. App. G., p. 28a.

In deciding in favor of a regular education class placement, the hearing officer considered information about Rachel from many sources, including Rachel's previous special education teacher, speech therapist, the school district's regular education teacher, assessors from

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[4] Rachel has remained at Shalom School during the pendency of the administrative and judicial proceedings. She is currently in a fourth grade class. Ninth Cir. Pet. App. F, p.11a.

the Diagnostic Center who administered standardized tests, Rachel's regular kindergarten teacher at the private school, the clinical psychologist and special education integration teacher who conducted independent evaluations for Rachel's parents, Rachel's day-camp director and mother.[5]

Drawing from this information, the California Department of Education, made a number of factual findings: (1) The District's past efforts to accommodate Rachel's needs in an integrated environment were not sufficient, and were without the benefit of consultation with special education personnel, support of an aide or any training; (2) Rachel benefitted from her full-time participation in the regular education placement at the private school (she developed socially, her language developed, communication skills improved and she made academic growth); (3) Rachel made progress on the goals and objectives in her IEP[6] and these goals and objectives are consistent with the goals for the first-grade class; (4) as a result of placement with regular peers, Rachel was motivated and interested in learning and learns from

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[5] See "Discussion of Relevant Evidence" in California Department of Education decision, H.O. Pet. App. I, p. 61a-68a.

[6] For each disabled child eligible for special education, IDEA requires that an Individualized Education Program (IEP) be developed and reviewed at least annually by a multi-disciplinary team including the child's parent and teacher. It contains, among other things, a statement of the annual goals and short-term instructional objectives for the individual child and criteria for determining at least annually whether instructional objectives are being achieved. The IEP also must specify the extent to which each child will be able to participate in regular educational programs. 20 U.S.C. § 1401(20); § 1414(a)(5). Also see § 1413(a)(11).

imitation and modeling as well as from repetition; (5) the District's proposed "pieced together" special and regular education program is "a confusing and disjointed program" involving moving Rachel in and out of regular class at least six times during each school day; (6) the regular first grade students would provide good models for Rachel for the following year; (7) the nature and quality of the integration time proposed by the District was not an improvement over what was previously provided and lacked any supplemental support or services for Rachel when the District would integrate her with non-disabled children; and (8) Rachel's participation in regular education would be beneficial to the regular students. Pet. H.O. Pet. App. I, pp. 81a-85a.

While the school district believed Rachel's integration experiences in a regular kindergarten class were unsuccessful, the hearing officer gave greater weight to the testimony of Karen Newton, Rachel's kindergarten teacher at Shalom School who testified that Rachel made progress over the course of the year in her class. H.O. Pet. App. I, p. 83a.

The school district appealed the decision of the California Department of Education to federal district court. In December 1991, Judge David F. Levi held an additional 3-day evidentiary hearing for the purpose of hearing evidence on Rachel's progress in her regular classes since the administrative hearing (first grade and part of second grade). Dist. Ct. Pet. App. G, p. 29a.

On March 2, 1992, Judge Levi affirmed the decision of the hearing officer and ordered that Rachel be placed in "a regular second grade classroom, with some supplemental services, as a full-time member of the class." (Dist. Ct. Pet. App. G., p. 48a) and made the following factual

findings: (1) Rachel receives "substantial academic benefits" in regular education; (2) all of Rachel's goals and objectives in her IEP can be achieved in the regular class with some curriculum modification and through supplementary aids and services; (6) Rachel made "very little progress" while in special education; (7) the school district failed to establish that the educational opportunities in the special education class were at least equal to or superior to those in the regular classroom for Rachel; (3) Rachel participated in all activities in the regular class; (4) the areas of emphasis in Rachel's IEP are the major areas of emphasis for the second grade class as a whole; and (5) there was no evidence presented that Rachel is a discipline problem at school or distracts other children or is too burdensome to the regular class teacher. Witnesses from both sides reported that Rachel is an "agreeable child who follows directions and is well-behaved". Dist. Ct. Pet. App. G, pp. 41a-44a.

In arriving at his findings, Judge Levi also considered testimony from a variety of sources including the administrative hearing record as well as court testimony by the Diagnostic Center assessors, school district administrators, Rachel's teachers, Rachel's mother, special education experts on the integration of children with disabilities into regular classes, and a California Department of Education special education consultant. In resolving conflicting testimony regarding academic progress, Judge Levi found the Holland and Department of Education's witnesses to be "more credible" based on their greater expertise and experience in evaluating disabled children placed in regular classrooms and their greater opportunity to observe Rachel over an extended period of time in normal circumstances. Dist. Ct. Pet. App. G, 40a.

Because of the conflicting expert testimony, Judge Levi found the testimony of Rachel's second grade teacher, Nina Crone, an "experienced, skillful teacher . . . [with] no partisan involvement in the controversy to be all the more important." Dist. Ct. Pet. App. G, pp. 40a-41a. Ms. Crone testified that Rachel made progress on her IEP goals; that Rachel is in many ways a typical second-grader; her communication abilities and sentence length are improving; that Rachel is eager to participate in class and is very motivated. Dist. Ct. Pet. App. G, p. 41a. Judge Levi also concluded that when Rachel was in the district's special education class she was "shuttled into regular education class for informal mainstreaming" and was "treated as an outsider" by the other children in the class. Judge Levi found that the school district's current proposal mirrored these past practices, and "would mark Rachel as an outsider, depriving her of the primary benefit of mainstreaming". Dist. Ct. Pet. App. G, p. 42a. In contrast, he found that Rachel is a "full member" of her regular class, is enthusiastic about school, and "relishes her new friendships" she has developed in regular class. Dist. Ct. Pet. App. G, pp. 41a-44a.

The school district appealed Judge Levi's decision to the Ninth Circuit Court of Appeals. On January 24, 1994, the Ninth Circuit affirmed the district court decision. The Ninth Circuit, in affirming, approved the factors the district court used in evaluating whether a regular class was appropriate for Rachel, reviewed the evidence Judge Levi considered in arriving at his decision and his reasons for finding the testimony of the Holland experts to be more persuasive. The Ninth Circuit unanimously affirmed the factual findings of the court below concluding that the

district court "conducted a full evidentiary hearing and made a thorough analysis." Ninth Cir. Pet. App. F, p. 22a.

The school district petitioned this Court for Writ of Certiorari on April 22, 1994. Respondent Rachel Holland, for the reasons set forth below, opposes the Petition.

SUMMARY OF ARGUMENT

In its petition for writ of certiorari, petitioner disputes the specific factual findings of the California Department of Education[7] and the district court which were affirmed by the Ninth Circuit and attempts to raise a conflict in the Circuit Courts which does not exist. The Ninth Circuit opinion is consistent with the sound reasoning of the other Circuits which have addressed the individual fact specific application of the mainstreaming requirements of the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400, *et seq.*, and will not result in the hyperbolic, unsubstantiated consequences that the petitioner projects. The claim that the Ninth Circuit decision requires a "school district to categorically place its disabled children full-time in regular education, even if all indications suggest that particular children cannot progress in regular education," Pet. at p. 9, could not be more unsupported by the record and decisions in this case. The district court and the Ninth Circuit explicitly rejected categorical placements in favor of the individualized, fact specific determinations required by the

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[7] As this Court has noted, courts reviewing decisions of state educational agencies should give "due weight" to the administrative proceedings. *Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 175, 206 (1982).

IDEA. Dist. Ct. Pet. App. G, 32a, *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989).

Likewise, there is nothing in either decision which would require "extended, painful and embarrassing failure" as the petitioner claims. Pet. at p. 9. Rather, the lower court decisions require an examination of the benefits of regular class placement.[8] In this case, the State Department of Education, the district court and the Ninth Circuit found that Rachel Holland experienced substantial benefits and success in regular education classes. It is not possible to justify the leap that petitioners make that failure is required or would be tolerated from the facts of this case or the decisions below. Petitioner's assertions throughout the petition, in essence, amount to a continuing dispute with the factual findings and the outcome of this case. It is well established that this Court will not "undertake to review concurrent findings of fact" by lower courts.[9]

The IDEA explicitly provides that children with disabilities be educated in regular classes unless "education

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[8] Judge Levi recognized that the regular class is appropriate for Rachel as long as she benefits. "If Rachel does not flourish under this placement, then adjustments should be made." Dist. Ct. Pet. App. G, p. 48a.

[9] *See* Fed. R. Civ. P. 52. In *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), the U.S. Supreme Court refused to reconsider questions of fact because this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See also Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967); *Rogers et al. v. Lodge, et al.*, 458 U.S. 613, 623 (1982); *Branti v. Finkle, et al.*, 445 U.S. 507, 512 n.6 (1980); *Goodman et al. v. Lukens Steel Co., et al.*, 482 U.S. 656 (1986).

in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B). In determining whether Rachel Holland could be satisfactorily educated in the regular education environment, the State Department of Education and the district court applied the facts of this case to the factors which have been identified by all of the Circuit Courts that have addressed the issue. These factors required an individualized assessment of whether Rachel Holland can receive academic and non-academic benefits in the regular education classroom, whether her presence is disruptive to other children or the teacher, and the costs of such placement. Ninth Cir. Pet. App. F, p. 12a.

After a fourteen day state administrative hearing involving 20 witnesses and a full evidentiary hearing in district court, both the California Department of Education and Judge Levi specifically found that Rachel Holland receives academic and non-academic benefit in the regular education classroom, that her presence is not disruptive to others in the class and that the district did not demonstrate that the cost of regular education would be significantly more expensive. Ninth Cir. Pet. App. F, p. 12a, 13a-16a and Dist. Ct. Pet. App. G, p. 38a-48a.[10] The school district "strenuously disagree[d]" with these findings in the Ninth Circuit. Ninth Cir. Pet. App. F, pp. 21a-22a. However, the Ninth Circuit refused to "disturb

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[10] This case did not require speculation about how Rachel might benefit from regular education placement. During the pendency of this case Rachel has been attending a private school fully integrated in regular education classes. Dist Ct. Pet. App. G, p. 26a. By the time of the district court trial, Rachel had completed kindergarten and first grade and was attending second grade. Dist. Crt. Pet. App. G, p. 29a.

the findings of the district court" *Id.* which it found "conducted a full evidentiary hearing and made a thorough analysis." *Id.*

Petitioner's first and fourth questions presented regarding the assessments by the petitioner's experts are simply another attempt to dispute these factual findings. Contrary to the assertion of petitioner, the district court did not disregard per se the tests conducted by the school district's experts, but rather after hearing from educational experts from both sides, as well as from Rachel's second grade teacher, the district court found the Holland's evidence to be more persuasive. Ninth Cir. Pet. App. F, pp. 13a-14a; Dist. Ct. Pet. App. G, p. 40a.

In its second question presented, the petitioner raises an issue which is simply not present in the record of this case. There is no evidence that Rachel was subjected to repeated failure in the regular education classroom, nor did the State Department of Education, the district court or the Ninth Circuit in any way suggest such a standard. All of petitioner's assertions about failure stem from its continuing dispute with the lower courts' refusal to accept the testimony of its witnesses that Rachel and all children like her cannot benefit from regular education.[11] This unsubstantiated prediction of failure was defeated in the face of Rachel's repeated success in regular education classes.[12] There is nothing in the decisions of the lower

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[11] The Ninth Circuit stated, "the district has consistently taken the view that a child with Rachel's I.Q. is too severely disabled to benefit from full-time placement in a regular class." Ninth Cir. Pet. App. F, p. 18a.

[12] At the time of the State administrative hearing, Rachel had completed kindergarten in regular education class. The

courts that requires that children with disabilities be subjected to repeated failure in regular education classes. The lower court decisions simply conform with current practice which requires that information from a variety of sources be considered to determine whether a child with a disability can be "satisfactorily educated" with supplemental aids and services in a regular education class.

Finally, petitioner in its third Question Presented, incorrectly characterizes the Ninth Circuit decision as creating a "new test" to determine compliance with IDEA's mainstreaming provisions. Pet. p. ii. First, the Ninth Circuit, in affirming the district court, did not create a "new test," but rather adopted the factors common to all the Circuit Court cases which have addressed the issue. As is clear from the Ninth Circuit's discussion of these decisions, all of the Circuit Courts have looked to the overall academic and non-academic benefits to the disabled child and the impact on the education of other children.[13] The 11th and 6th Circuits also consider the

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hearing officer concluded, based on all of the evidence including testimony from her regular and special education teachers, that Rachel made substantial progress in all areas and that her experience was "successful." H.O. Pet. App. I, p. 83a; Dist Ct. Pet. App. G, p. 41a. By the time of the district court trial, Rachel was in second grade. The Holland's educational experts, as well as Rachel's regular education teacher for second grade also testified to her progress and success in regular education classes. Dist. Ct. Pet. App. G, pp. 38a-41a.

The only "failure" in the record of this case is in the special education class offered by the district. The district court found that the program proposed by the district "mirrors in part the deficiencies of the previous program" Dist. Ct. Pet. App. G, pp. 41a-42a.

[13] Ninth Cir. Pet. App. F, p. 20a, footnote 5 citing *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048-49, *Oberti v. Board*

costs of regular education placement, a factor which was adopted by the district court and Ninth Circuit in this case.[14] There is absolutely no conflict posed in the Ninth Circuit decision.[15]

The "balancing" of factors to which petitioner objects is required by all of the Circuit Courts in decisions under 20 U.S.C. § 1412 (5)(B), as in all other decisions about services and placements under the IDEA. In essence, petitioner objects to the individualized inquiry required to implement the statutory presumption in favor of mainstreaming which is recognized in all the Circuits interpreting the IDEA.[16]

Second, it is indisputable that according to the factual findings adopted by the district court and the Ninth Circuit, the result would be identical for Rachel Holland in each of the Circuits that have addressed the issue. The petitioner does not even proffer an argument for its claim that, based on the factual findings in this case, Rachel's "mainstreaming rights" would depend on the Circuit in

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of Education, 995 F.2d 1204, 1217-1218 (3rd Cir. 1993); *Greer v. Rome City School District*, 950 F.2d 688, 696-97 (11th Cir. 1991); Ninth Cir. Pet. App. F, p. 21a, footnote 6, citing *Roncker v. Walter* 700 F.2d 1058, 1063 (6th Cir. 1983).

[14] *Greer, supra*, at 697; *Roncker, supra*, at 1063; Dist. Ct. Pet. App. G, p. 36a; Ninth Cir. Pet. App. F, pp. 20a, n.5; 21a.

[15] The district court specifically adopted the factors of the federal appellate courts. Dist. Ct. Pet. App. G, pp. 32a-37a.

[16] Ninth Cir. Pet. App. F, p. 19a. *See Daniel R.R. supra*, at 1048; *Oberti, supra*, at 1213-1214; *Greer, supra*, at 695, *Roncker, supra*, at 1063-1064; *Department of Education v. Katherine D.*, 727 F.2d 809, 817 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 295 (7th Cir. 1988), cert. denied, 484 U.S. 847 (1988); *Devries By DeBlaay v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1985); *A.W. v. Northwest R-1*, 813 F.2d 158, 162 (8th Cir. 1987).

which she resides.[17] Pet. p. 13. All of the fact finders in this case found that Rachel receives substantial academic benefit in regular education classes (as well as non-academic benefit). The courts below also specifically found that Rachel could not receive greater or equal educational benefits in special education classes. Dist. Ct. Pet. App. G, p. 41a. Hence, even if there were some merit to petitioner's claim that the Circuit Courts do not all use the same factors, certiorari should be denied because the result would be the same in any of the Circuits to address the issue.

Far from being "skewed too far in favor of categorical full-time regular education placement to comply with IDEA's" mainstreaming "mandate", as the petitioner suggests (Pet. p. 22) the State Department of Education, the district court and the Ninth Circuit simply rejected the petitioner's assertion in each forum that categories of disabled children can be excluded from the regular education classroom, in favor of the individual factual inquiry required by IDEA. As the district court stated:

> Thus, the decision as to whether any particular child should be educated in a regular classroom setting, all of the time, part of the time, or none of the time, is necessarily an inquiry into

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[17] Significantly, the U.S. Department of Justice, which filed an amicus brief on behalf of the U.S. Department of Education in the Ninth Circuit in this case and which has responsibility for nation-wide enforcement of the IDEA, concluded that the district court properly applied the factors identified by other appellate courts in evaluating whether the mainstreaming requirements of IDEA have been met. U.S. Department of Justice Amicus Brief pp. 18-23 for the U.S. Court of Appeals, Ninth Circuit, *Sacramento City Unified School District, Board of Education v. Rachel Holland*, No. 92-15608.

> the needs and abilities of one child, and does not extend to a group or category of handicapped children, as the District suggests. See *Daniel R.R.*, 874 F.2d at 1048 ("our analysis is an individualized, fact specific inquiry").

Dist. Ct. Pet. App. G, p. 37a.

Applying the factors identified by every Circuit to address the mainstreaming requirements of the IDEA, the State Department of Education hearing officer, the district court, and the Ninth Circuit, concluded that the appropriate placement for Rachel Holland, under the IDEA, is a regular education classroom, with supplemental aides and services. The petitioner's request for review by this Court is simply another attempt to relitigate the facts of this case and therefore should be denied.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF THE INDIVIDUALIZED FACTUAL DETERMINATIONS OF THE CALIFORNIA DEPARTMENT OF EDUCATION AND THE DISTRICT COURT WHICH WERE AFFIRMED BY THE NINTH CIRCUIT THAT RACHEL HOLLAND BENEFITS FROM PLACEMENT IN A REGULAR EDUCATION CLASS

Petitioner's first, second, fourth and fifth Questions Presented are an attempt to relitigate the factual findings of the California Department of Education and federal district court which were affirmed by the Ninth Circuit. In particular, the petitioner, as in the Ninth Circuit, "strenuously disagrees with the district court's findings that Rachel was receiving academic and non-academic benefits in a regular class" because the court's findings

were contrary to the evidence of the petitioner's witnesses. Ninth Cir. Pet. App. F, pp. 21a-22a. Petitioner acknowledges that the findings of fact by the State Department of Education and the district court are not subject to review by this Court. The hearing officer and district court heard conflicting evidence and both concluded that the Holland's witnesses were more knowledgeable, credible and experienced. As the Ninth Circuit stated, "The district court conducted a full evidentiary hearing and made a thorough analysis. . . . We will not disturb the findings of the district court." Ninth Cir. Pet. App. F, 22a. It is well established that this court will not disturb the findings of facts of the lower courts in a case such as this, where there was an opportunity for two full evidentiary hearings.[18]

A. Petitioner's Assertion that the Ninth Circuit Rejected Standardized Aptitude Tests is a Misstatement of the Facts and Law in this Case. The Courts Below Considered Information From a Variety of Sources, as Required by IDEA and Made a Specific Factual Determination That Rachel Holland Benefits From Regular Education Class Placement.

The petitioner's assertion that placement decisions must be "guided by standardized 'aptitude and achievement' tests" and that these tests were per se rejected "as a method of evaluating placement appropriateness", is a

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[18] See *infra*, p. 9 n.9.

misstatement of the law and the facts in this case.[19] Pet., p. 14. The petitioner cites the IDEA implementing regulations, 34 C.F.R. § 300.533(a)(1)(3) for the proposition that standardized aptitude tests must guide placement decisions. In fact, 34 C.F.R. § 300.533(a)(1) commands that information be drawn from a "variety of sources", and 34 C.F.R. § 300.532(a) admonishes that "no single procedure is used as the sole criterion for determining an appropriate educational program for a child".[20] The petitioner's attempt to substitute aptitude tests for the explicit multidisciplinary approach of the IDEA would be wholly unworkable and contrary to well-established practice.[21] As required under the IDEA, the California Department

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[19] This argument appears to address Question Presented No. 4. Question Presented No. 1 suggests either that school districts can unilaterally make placement decisions or that there was consensus among the "educational professionals". Pet. p. i. First, unilateral placement decisions by school officials are contrary to the requirements of the IDEA. *Honig v. Doe*, 484 U.S. 305, 321 (1987). The procedural safeguards of the IDEA assure that parents can challenge all school district decisions regarding evaluations and placement. 20 U.S.C. § 1415 (b)(1)(D)(E), *Board of Education of the Hendrick Central School District v. Rowley*, 485 U.S. 175, 183. Second, as is evident by the record and decisions in this case, the "educational professionals" disagreed about whether Rachel achieves measurable academic progress. Dist. Ct. Pet. App. G, pp. 38a-42a.

[20] 34 C.F.R. § 300.533 also requires that "the placement decision is made in conformity with the least restrictive environment rules in C.F.R. § 300.500 - 300.554"; *see also* 20 U.S.C. 1412(5)(C).

[21] Petitioner's novel argument that the court erred by rejecting standardized aptitude tests or that they were per se rejected was not presented nor briefed in the courts below. Moreover, whether or not the standardized test results indicated progress was also a disputed factual issue. R.T. 465: 9-12.

of Education and federal district court considered information from a variety of sources including testing, extensive observations by many experts, and Rachel's teachers and parents before concluding that Rachel benefitted from her regular class placement. This is the usual process for ascertaining the appropriateness of a particular placement for an individual child. 34 C.F.R. § 300.533; 20 U.S.C. § 1401(20); § 1412(5)(C); § 1414(a)(5).

Furthermore, contrary to the assertion of the petitioner, the district court did not reject the petitioner's experts' testimony because their "standardized testing techniques" were biased by their "educational philosophy". Pet. p.16. Both the State Department of Education and the district court carefully evaluated the evidence from both sides and concluded, based on the knowledge, expertise, experience and credibility of the witnesses that Rachel Holland benefitted significantly from regular education class. The Ninth Circuit explained its reasons for deferring to the factual findings of the district court:

> . . . the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in the regular classroom and they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, who the court found to be an experienced, skillful teacher.[22]

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[22] Because of the conflict between the experts as to Rachel's academic progress, the district court found "the testimony of her current teacher is all the more important. The District concedes that Nina Crone, Rachel's second grade teacher, is an experienced, skillful teacher. She has no partisan involvement in

Pet. App. F, p. 13a. With respect to non-academic benefits, the Ninth Circuit affirmed that "the testimony of Rachel's mother and her current teacher to be the most credible." Ninth Cir. Pet. App. F, p. 14a. Similarly, on the issue of Rachel's effect on the teacher and other children, the court also found "the most germane evidence" from the second-grade teacher, Nina Crone. *Id.* at 15a. Contrary to petitioner's assertion, these reasons for affording greater weight and credibility to the Holland witnesses have nothing to do with educational philosophy. Dist. Ct. Pet. App. G, p. 41a.

Petitioner's attempt to characterize the district court factual findings as "an explicit rejection" of all standardized testing is completely unsupported by the lower court decisions. As the petitioner recognizes, the lower court's findings of fact based on full evidentiary hearings are not subject to review by this court.[23]

B. The Petitioner Poses a Factual Issue – Repeated Failure – Which is Not Present in The Record.

In the second Question Presented, the school district poses an issue not even presented in this case; that is, whether a child must be subjected to "repeated failure" before a school district can place the child in a special education setting. Pet. p. 15. All of petitioner's assertions about the Ninth Circuit requiring "repeated failure" are based on the premise that the petitioner's witnesses were

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this controversy. Crone testified that Rachel is a full member of the second grade class." Dist. Ct. Pet. App. G, p. 40a- 41a.

[23] See *infra*, p. 9 n.9.

correct that Rachel and all other children with her disability will fail in regular education.[24] This is precisely the factual issue which was resolved in the lower courts in favor of the Holland's witnesses' testimony about the substantial success Rachel experienced in regular education class. The only failure in the record is Rachel's experience in the special education classes of the school district.[25]

To the extent that petitioner is arguing that a legal standard of "repeated failure" is required by the Ninth Circuit, it is a misstatement which cannot be substantiated. There is nothing in any of the decisions below to even suggest such a standard. Petitioner's argument is premised on the false notion that the courts reject standardized tests and therefore the school districts have no choice but to place children in regular classes and wait until they "repeatedly fail" before removal can be considered. Clearly, the Ninth Circuit was not adopting such an ill-founded standard. As explained above, the Court did not per se reject testing as a means of evaluating progress or determining placement. Whether a disabled child has progressed on the IEP goals and objectives and whether the IEP can be implemented in a particular placement are determinations made by the IEP team based on information from a variety of sources, including tests, teacher observations, adaptive behavior and social and cultural factors.[26] Prospective determinations are made every day

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[24] See *infra*, p. 11 n.11.

[25] See *infra*, p. 11 n.12.

[26] Assessments of progress and placement decisions must be made by a multi-disciplinary team including the child's parent and teacher through the statutory required Individualized

for children with disabilities through the IEP process. There is nothing in the Ninth Circuit decision which would disrupt current practice. However, petitioner's suggestion that standardized test scores be the sole criteria, would drastically change current practice and would be wholly contrary to the explicit procedures of the IDEA.

Consistent with decisions of all other appellate courts addressing this issue, the Ninth Circuit applied the statutory preference for mainstreaming in making placement decisions. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991). In upholding the presumption in favor of regular class placement, the court below did not preclude the IEP team from making prospective placement decisions. This is what the IEP team normally does based on all the available information. The school district's mischaracterization that the Ninth Circuit automatically requires placement in the regular class and "repeated failure" there before removal to a special education setting can be considered, reflects nothing more than the district's continuing assertion that certain categories of children cannot benefit from regular class placement. Dist. Ct. Pet. App. G, p. 32a. The Ninth Circuit decision simply requires an individualized determination of the appropriate least restrictive placement, consistent with

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Education Program (IEP) process, and must include information from a variety of sources. 20 U.S.C. § 1401(20); § 1412(5)(C); § 1414(a)(5); 34 C.F.R. § 300.533.

the IDEA. After conducting the fact specific inquiry, the lower courts concluded that Rachel Holland experienced repeated success, not failure, in regular education class. This factual finding cannot be disturbed in this Court.

C. Whether the Age Range in a Particular Class is Appropriate for a Specific Child is a Factual Determination

In the fifth Question Presented, petitioner claims that a two year age difference between Rachel and her classmates constitutes a per se violation of the federal mainstreaming requirement. The federal mainstreaming requirement does not specify an exact age range permissible in a regular classroom, nor does it rule out a particular age range as a per se violation of the law. Whether a certain age range is appropriate for an individual child is a factual determination. In this case Judge Levi found that the age difference "is not so pronounced that [Rachel] is learning inappropriate behavior or is not perceived as part of the class." Dist. Ct. Pet. App. G, p. 44a.

II. THE NINTH CIRCUIT OPINION DOES NOT CREATE A CONFLICT WITH OTHER CIRCUIT COURTS. RATHER, THE NINTH CIRCUIT APPLIED THE FACTORS RECOGNIZED BY ALL THE CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE TO DETERMINE WHETHER AN INDIVIDUAL CHILD WITH A DISABILITY CAN BE "SATISFACTORILY EDUCATED" IN A REGULAR EDUCATION CLASS IN ACCORDANCE WITH 20 U.S.C. § 1412(5)(B).

The petitioner's assertion that the Ninth Circuit created a "new test" to determine compliance with 20 U.S.C. § 1412(5)(B) is belied by a review of the Ninth Circuit decision itself. The Ninth Circuit expressly adopted the

factors applied by all of the other Circuit Courts which have addressed the issue, to determine whether Rachel Holland could be satisfactorily educated in regular education classes pursuant to 20 U.S.C. § 1412(5)(B). All of the Circuit Courts have recognized that this highly "fact specific inquiry"[27] requires a balancing of factors to determine whether a child can be satisfactorily educated in regular education classes.

The Ninth Circuit, in adopting the factors set forth in the district court opinion, found no conflict with other Circuits, but instead found that the district court had adopted all of the factors found in the other Circuits.[28] The Ninth Circuit's discussion of these cases makes it clear that as a practical matter, the factors to be considered are consistent, calling upon courts to determine the benefits (both academic and non-academic) of regular class placement with supplementary aids and services and the effect of the disabled child's presence on the teacher and other students.[29]

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[27] See Ninth Cir. Pet. App. F, p. 17a; *Daniel R.R.*, 874 F.2d at 1048; *Roncker*, 700 F.2d at 1064; *Greer*, 950 F.2d at 696; *Oberti*, 995 F.2d at 1223, n.28.

[28] "Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* tests over the *Roncker* test. Rather, it employed factors found in both line of cases." Ninth Cir. Pet. App. F, p. 21a

[29] The Ninth Circuit's discussion of the other Circuit Court decisions (Ninth Cir. Pet. App. F, p. 20a, footnote 5 and Ninth Cir. Pet. App. F, p. 21a, footnote 6) demonstrates that the Ninth Circuit incorporated all of the factors found in the other Circuits. While all courts look to the benefits of regular class placement with supplementary aids and services and any possible negative effect on the teacher or the class, the Ninth Circuit noted that the 11th Circuit in *Greer*, 950 F.2d at 696-697 looked at

In fact, it is difficult to decipher where the purported conflict lies.[30]

Likewise, the district court found no conflict in the Circuits and explicitly relied on the decisions of the other appellate courts interpreting 20 U.S.C. § 1412(5)(B) to

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costs as well, and that the 3rd and 11th Circuits in *Oberti*, 995 F.2d at 1216 and *Greer*, 950 F.2d at 697, also look to the comparative benefits of special and regular education placement. These factors were explicitly adopted by the lower courts in this case (Ninth Cir. Pet. App. F, p. 21a; Dist. Ct. Pet. App. G, pp. 32a-33a).

[30] In *Daniel R.R.*, the Fifth Circuit declined to follow the formulation of the Sixth Circuit in *Roncker*, 700 F.2d at 1063, which required a determination of whether the special education services could be provided in regular education classes, preferring to use the words of the statute, "supplementary aids and services" *Daniel R.R.*, 874 F.2d at 1046. As the district court in this case recognized, the inquiry is the same.

The district court correctly viewed *Greer* (following *Daniel R.R.*) and *Roncker* as requiring the school district to consider whether supplemental aids and services would permit satisfactory education in the regular classroom. (Dist. Ct. Pet. App. G., p. 34a). In *Roncker* the question before the court was placement in a segregated facility versus placement in a special education class on a regular school site. For this reason the Court spoke in terms of special education services available at the segregated site being made available in a special day class. *Roncker, supra* at 1063. For the purposes of determining whether regular class placement is appropriate, the fact that the *Roncker*, court refers to the services in reference to the services available in special education and the *Daniel R.R.*, 874 F. 2d at 1048, *Greer*, 950 F.2d at 696 and *Oberti*, 995 F. 2d at 1214 courts refer to the services in reference to the statutory language of "supplementary aids and services" is of no practical import. All the courts require consideration of the aids and services which a child with a disability may require to benefit from regular education placement. Ninth Cir. Pet. App. F, p. 20a, footnote (5) *Daniel R.R., supra, Greer, supra, Oberti, supra.*

"guide the court's analysis." Dist. Ct. Pet. App. G, p. 32a. The district court stated:

> The federal appellate courts have recognized the following factors as relevant to determining if a placement is appropriate: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom; (2) the non-academic benefits to the handicapped child of interaction with nonhandicapped children; (3) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the handicapped child in a regular classroom setting. *Greer v. Rome City School District*, 950 F.2d 688, 697 (11th Cir. 1991); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 153-54 (4th Cir.), *cert. denied*, 112 S. Ct. 175, 116 L. Ed. 2d 138 (1991); *Daniel R.R.*, 874 F.2d at 1048-50; *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed. 2d 171 (1983).

Pet. App. G, pp. 32a-33a.

The district court cited both *Daniel R.R.* and *Roncker* as authority in identifying the proper factors to be considered in applying § 1412(5)(B) to the facts of a particular case and relied on the analysis set forth in each of these appellate court decisions in its discussion of these factors. Dist. Ct. Pet. App. G, pp. 32a-38a. The district court correctly found consistency, not conflict, in these decisions.

The petitioner offers no support for its claim that the Ninth Circuit's test "differs significantly in its analytic approach." Pet. p. 12. As stated above, both the district

court and the Ninth Circuit relied on these other decisions and adopted common factors, finding no conflict. The petitioner cannot point to any of the standards adopted by the Ninth Circuit that conflict with other Circuits or would in any way affect the outcome of this case. It is difficult to understand which standard petitioner objects to. Clearly, the IDEA requires the court to look at the benefits (academic & non-academic) of the regular class placement. It appears unlikely that the petitioner is objecting to the Court's consideration of any disruptive effect on the teacher or other children or the costs of regular education placement. Each of these factors was carefully examined, and it was decided that Rachel receives substantial benefit from regular class placement, is not disruptive and that the cost is not significant. The petitioner is attempting to create an artificial split in the Circuits because it does not approve of the mainstreaming presumption employed by all the Circuits[31] and with the outcome of this case.

The contention that the other appellate decisions offer limits to mainstreaming not found in the Ninth Circuit has no basis.[32] The only limit which petitioner claims exists in other Circuits comes from a gross misstatement of the standards enunciated in those cases. The petitioner wrongly claims that the *Daniel R.R.* test limits regular education placement "if the child does not have the cognitive ability to grasp the essential elements of the

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[31] 20 U.S.C. § 1412(5)(B); See also *infra*, p. 11 n.12, p. 13 n.16.

[32] If anything, the Ninth Circuit provides a limit not found in other cases by allowing consideration of the costs of regular education placement. See discussion, *infra*, pp. 23-24 n.29.

regular education curriculum." Pet., p. 11. This characterization of *Daniel R.R.* is particularly astounding in that the Fifth Circuit explicitly overturned the lower court in that case because it "would require handicapped children to learn at approximately the same level as their non-handicapped classmates" and because the lower court "places too much emphasis on the handicapped student's ability to achieve an educational [academic] benefit." *Daniel R.R.*, 874 F.2d at 1046. Throughout its opinion, the Fifth Circuit "reiterate[s] . . . that academic achievement is not the only purpose of mainstreaming."[33] The Fifth Circuit emphasized the need to look at the "overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each handicapped child."[34]

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[33] *Id.* The district court in this case quoted the Fifth Circuit as follows:

> (The language and behavior models available from non-handicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from non-academic experiences in the regular education environment) District Court, Pet. App., G., p. 34a, citing *Daniel R.R.*, 874 F.2d at 1049

[34] 874 F.2d at 1049. The petitioner claims that the district court departed from *Daniel R.R.* because it did not consider curriculum modification as a separate factor. In *Daniel R.R.*, the court was concerned about curriculum modification as it related to the burden on the teacher and the benefits received by the child with a disability, stating that mainstreaming would not be appropriate if "the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student" 874 F.2d at 1049. Similarly, the district court in this case considered curriculum modification relevant for the same reasons – the burden on the teacher and the disabled child's "sense of belonging in the class". Dist. Ct. Pet. App. G, p. 37a.

The petitioner's assertion that the Ninth Circuit's purported "new test" subordinates academic progress to mainstreaming is also without merit and flatly inconsistent with the facts of this case. The courts below did not adopt any general standards which create any conflict between the requirements that children with disabilities receive "appropriate" education and the mainstreaming requirements in 20 U.S.C. § 1412(5)(B). The court below held that regular education class is required only when the child can receive an appropriate education there. The district court defined as the "central question" whether, "for Rachel, a full-time placement in regular education class is the "appropriate" placement. Dist. Ct. Pet. App. G, p. 25a. In determining whether Rachel could receive an appropriate education in the regular education class, the court did not elevate mainstreaming over educational progress as petitioner claims (Pet. p. 19), but rather examined the specific goals and objectives in Rachel's Individual Education Plan (IEP) and found based on the evidence, "that all of Rachel's goals and objectives could be achieved either in regular class with some curriculum modification or through supplementary aids and services." Dist. Ct. Pet. App. G, pp. 27a, 40a-42a.

Moreover, the courts below made specific findings that special education did not offer better or equal academic or non-academic benefits to Rachel.[35] Hence, the petitioner's hypothetical assertion that the Ninth Circuit

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[35] Ninth Cir. Pet. App. F, p. 13a; "[t]he district offered no persuasive evidence that Rachel could receive educational benefits in special education classes that are equal or greater than those available in special [sic; regular] education classes." Dist. Ct. Pet. App. G, p. 41a.

elevated mainstreaming over academic benefit is simply not presented in this case.[36]

The Ninth Circuit opinion creates no conflict with the other Circuits. Rather, the district court and the Ninth Circuit explicitly relied on these opinions and adopted all of the factors identified by the other Circuits to determine compliance with 20 U.S.C. § 1412(5)(B). Moreover, it is indisputable that given the factual findings in this case, the result would be the same in the other Circuits. This is not a close case. Every Circuit to consider the issue recognized that if a child receives "substantial" educational benefit, is a "full member" of the class and poses no disruption to the teacher or other children, regular education class placement is appropriate. Dist. Ct. Pet. App. G, pp. 41a-42a, 44a-45a. There is no conflict or factual error for this court to resolve.

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[36] Many courts have recognized as Judge Levi cited, that "the Act's requirement of integration, based on recognition of the non-academic value of such integration, is not overcome by a showing that special education placement may be academically superior to placement in a regular classroom." Dist. Ct. Pet. App. G, p. 33a. *Roland v. Concord School Comm.*, 910 F. 2d 983, 993 (1st Cir. 1990), *Roncker*, 700 F.2d at 1063; *Norton School Comm. v. Massachusetts Dept. of Education*, 768 F. Supp. 900, 910 (D. Mass. 1991), *Daniel R.R.*, 874 F.2d at 1048. Judge Levi's statement emphasizes the need to balance various factors. It in no way suggests that a child should be placed in a class where he or she cannot receive an appropriate education.

Moreover, as these cases show, the issue of academic benefit versus overall educational benefits is often resolved in favor of school districts seeking to place children in the regular classroom as opposed to "academically superior" private schools. It is well established that school districts are not required to automatically place children in the "academically superior" class or school, disregarding other factors such as the benefits of mainstreaming. *Id.*

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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